IN THE

Supreme Court of the United States

October Term, 1943

No.

AMERICAN CREOSOTING COMPANY, INCORPORATED,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

KENNETH GARDNER,
Counsel for Petitioner, American Creosoting Company, Incorporated.

BERNARD D. ATWOOD,
of Counsel.

TABLE OF CONTENTS.

	PAGE
Opinions Below	1
Jurisdiction	1
Statute Involved	2
Questions Presented	2
Statement	3
Reasons for Granting the Writ	4
Conclusion	12
Appendix	13

Table of Cases.

Consolidated Edison Co. v. National Labor Relations Board, 305 U. S. 197	11
Dobson v. Commissioner of Internal Revenue, 320 U. S. ——, 88 L. Ed. 179, decided December 20, 1943	7, 8
Eagle-Picher Mining & Smelting Co. v. National Labor Relations Board, 119 F. (2d) 903 (C. C. A. 8)	9
Federal Power Commission v. Hope Natural Gas Co., 320 U. S. ——, 88 L. Ed. 276, decided January 3, 1944	7, 8
H. J. Heinz Co. v. National Labor Relations Board, 311 U. S. 514	11
National Labor Relations Board v. Electric Vacuum Cleaner Co., 315 U. S. 685	9, 10
National Labor Relations Board v. Isthmian S.S. Co., 126 F. (2d) 598 (C. C. A. 2)	9
National Labor Relations Board v. William Davies Co., 135 F. (2d) 179, 183 (C. C. A. 7)	9

PAGE

Phelps Dodge Corp. v. National Labor Relations Board, 313 U. S. 177, 199 (1941) 6

Triplex Screw Co. v. National Labor Relations Board, 117 F. (2d) 858 9

Authorities Cited.

Administrative Policies and the Courts (47 Yale Law Journal 519, 535 (1938)) by James M. Landis 8

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

AMERICAN CREOSOTING COMPANY, INCORPORATED, prays that a writ of certiorari issue to review the decree of the United States Circuit Court of Appeals for the Sixth Circuit entered on December 4, 1943 (R. 606) enforcing with modification an order issued by the National Labor Relations Board against the petitioner.

Opinions Below.

The opinion of the Circuit Court of Appeals (R. 607) is reported in 139 F. (2d) 193. The findings of fact, conclusions of law, and order of the Board (R. 84-111) are reported in 46 N. L. R. B. 240.

Jurisdiction.

The decree of the Circuit Court of Appeals was entered December 4, 1943. The jurisdiction of this Court is invoked

under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925, and under Section 10(e) of the National Labor Relations Act.

Statute Involved.

The pertinent provisions of the National Labor Relations Act are set forth in the Appendix to this petition.

Questions Presented.

The Circuit Court of Appeals had the case before it on the petition of the National Labor Relations Board seeking enforcement of the Board's order which directed reinstatement of forty-one men with back pay. The Court concluded that it had no power to review the time element in a back pay award. The Court also concluded that it would not disturb the Board's finding that the strike at the petitioner's plant in 1937 had been caused by unfair labor practices.

Accordingly, the following questions are presented:

1. Does the power of judicial review of administrative orders extend to a case in which the National Labor Relations Board penalizes an employer for the Board's own neglect—here the failure to issue a complaint for four years from the events complained of and for more than three years after the last of several "charges" was filed with the Board by the Union?

2. As a corollary of the first question, should this Court not strike at least two and one-half years from the back pay award, and this after an allowance of more than six months—surely more than is necessary—for the Board to investigate and issue a complaint?

3. Did the Circuit Court of Appeals place too much emphasis in this case on what it referred to in its opinion as "the liberality accorded" the Board's "concept of substantial evidence" (R. 608); and on a proper conception of "substantial evidence" should not the Board's petition have been dismissed?

Statement.

On September 24, 1937, a sit-down strike occurred at the respondent's plant at Russell, Kentucky, which at that time employed about 120 men. The sit-down strike, a partial strike of key men, was called upon instructions from the Union (R. 305, 362). It was followed by another sit-down strike on October 4, 1937 (R. 309, 518) and a general strike of the entire plant followed (R. 138). The strike terminated December 23, 1937 (R. 184). More than four years after the strike began and more than three years after the filing of the last charge, which was the second amended charge filed August 4, 1938 (R. 28, 106), the National Labor Relations Board issued its complaint dated October 6, 1941 (R. 30), alleging violations of the Act and alleging that the strike was caused and prolonged by unfair labor practices on the part of your petitioner.

Hearings were held in November, 1941 (R. 111-571). The Trial Examiner filed an intermediate report (R. 44) to which your petitioner excepted (R. 71). Your petitioner presented to the Board various arguments on the law and the facts, particularly objecting to the provision for back pay for more than three years and nine months before the issuance of the complaint. The Board's decision (R. 84) ignored the latter point, discussed the other matters at length and ordered your petitioner to pay back pay to forty men beginning in 1937 and to one man beginning August 4, 1938.

On the Board's petition for enforcement, the Circuit Court of Appeals on December 4, 1943 modified the Board's order to give your petitioner the benefit of the fact that the average number of employees after the strike was considerably smaller than the number employed before the strike. A group of twenty-eight of the men, said the Court, "as a group is entitled to the composite of wages paid to the group which replaced it" (R. 612). This petition does not question this modification.

However, the Court concluded that it was without power to shorten the duration of the back-pay period under the circumstances here. The Court further concluded that "while the Board drew inference of sinister purpose from some circumstances that may have been innocuous, * * *" (R. 609) it nevertheless would not disturb the Board's findings.

The foregoing statement is a brief summary of the chronology of the case. For convenient reference, some of the points are discussed more fully in the next subdivision of this petition.

Reasons for Granting the Writ.

A.

The Circuit Court of Appeals has said in effect that it is without power to review the extent to which a back pay award may properly antedate the issuing of a complaint by the Board. The Court's stated reason is that "the statute contains no time-limit mandate" (R. 610).

Thus the Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court.

The question was disposed of in the Court's opinion of December 4, 1943, by this brief discussion:

> "The respondent protests against being required to contribute back-pay from December, 1937, to the date of compliance. While the charges filed with the Board were seasonable, the hearing did not take place until four years after the strike, with the Board's decision coming a year later. Such delay, it is urged, makes the back-pay order unconscionable. However, we held in *Triplex Screw Co.* v. *N. L. R. B.*, 117 Fed. (2d) 858, that a complaint of this character does not fall within the purview of our power to grant relief since the statute contains no time-limit mandate for the rendering of decisions by the Board" (R. 610).

Although the foregoing quotation shows how the Court disposed of the question, it does not contain a precise statement of your petitioner's position. Your petitioner does not argue that delays *after* the complaint was issued on October 6, 1941 (R. 30) should reduce back pay. It is the delay prior thereto which was the basis of your petitioner's objections before the Board, the Circuit Court of Appeals, and is now the basis here. The first charge was filed with the Board in December, 1937 (R. 601). The second amended charge (R. 28) upon which the complaint was issued was filed August 4, 1938 (R. 106).

Thus there was a delay of more than three years between the time when the Board was called upon to act and the date of the issuance of the complaint. Regardless of the reasons for the delay, your petitioner should not be called upon to pay back pay to forty-one men for this period. There was no way that your petitioner could know during that time whether the Board considered the case of sufficient merit to justify a complaint and a hearing, and

hence no way for your petitioner to make financial provision for the huge liability which might result and which has now resulted.

The National Labor Relations Act did not compel the Board to reach into the past more than three years prior to the date of its complaint for the beginning of the back pay. "The remedy of back pay, it must be remembered, is entrusted to the Board's discretion; it is not mechanically compelled by the Act." *Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U. S. 177, 199 (1941).

Naturally there are many cases where in the regular administration of the Act it has been and will be proper to start the back pay running on a date prior to the issuance of the complaint. This period should be reasonable. A period of more than three years is unreasonable, unconscionable and is a discredit to the Act rather than an effectuation of its policies.

But, it will be said in answer, the Board found (R. 109) that it "will effectuate the policies of the Act" to have back pay computed as set forth in its order, *i. e.*, without diminution by reason of the delay, and it will be said that this finding is conclusive. There will be invoked the usual arguments to support the claim of finality of administrative orders.

Such arguments may be sound in a proper case, but the petitioner submits that this is not a proper case. The Court should not abdicate its functions by refusing to review the question here presented, and the Court below was in error when it stated that "a complaint of this character does not fall within the purview of our power to grant relief" (R. 611).

The reason is this: in issuing its finding and order on this point the Board was passing judgment upon its own

fault and was saddling your petitioner with a penalty which had grown to tremendous size as the result of the Board's delay in issuing a complaint. Should an administrative body be immune from judicial review of such an internal failing, particularly since the consequences are so disastrous?

In recent months this Court has had occasion more than once to examine the scope of its review of administrative action. One such case is *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U. S. ....., 88 L. Ed. 276, decided January 3, 1944. Another is *Dobson* v. *Commissioner of Internal Revenue*, 320 U. S. ....., 88 L. Ed. 179, decided December 20, 1943. In the latter case this Court stated at some length the reasons why the Tax Court as an administrative body is qualified to receive from the courts the benefits of the doctrine of finality of administrative determination. A statement of some of those reasons reveals some striking contrasts:

1. The Tax Court, it was said by this Court, "is independent and its neutrality is not clouded by prosecuting duties." 88 L. Ed. at p. 185.

Contrast: The National Labor Relations Board investigated, interviewed witnesses, prepared the case.

2. The Tax Court's "deliberations are evidenced by careful opinions." 88 L. Ed. at p. 185.

Contrast: For all the petitioner's exceptions, objections and arguments before the National Labor Relations Board and the Court on the question of the three-year delay the petitioner has received nothing but silence from the Board and a word of regret from the Court of Appeals declining to deal with the question.

3. In the case of the Tax Court, "individual cases are disposed of wholly on records publicly made, in adversary proceedings, and the [Tax] court has no responsibility for previous handling" 88 L. Ed. at page 185.

> *Contrast:* The National Labor Relations Board is the adversary and has complete responsibility for previous handling, including the decision when and whether to issue a complaint.

Even more important, both the opinions referred to above revert to a frequently-advanced reason for administrative finality, viz., that the administrators are experts in a specialized field. The Tax Court "deals with a subject that is highly specialized and so complex as to be the despair of judges." *Dobson* v. *Commissioner*, 320 U. S. ___, 88 L. Ed. 179, 185. An order of the Federal Power Commission "is the product of expert judgment which carries a presumption of validity." *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U. S. ___, 88 L. Ed. 276, 283.

But when a government Board with administrative functions passes judgment on its own faults it is not an impartial expert in a highly specialized field and should not be immune from judicial review.

The position was stated another way by James M. Landis in *Administrative Policies and the Courts*, 47 Yale Law Journal 519, 535 (1938):

> "I return thus to the issue of 'law' as being the dividing line of judicial review—as bounding the province of that 'supremacy of law' that is still our boast. Its content, in so far as it relates to judicial review of administrative action, seems to me to reach back to the question of expertness. *Our desire to have courts determine questions of law is related to a belief in their possession of expertness with regard to such questions.*" (Italics in original.)

The Board in its brief below and the Circuit Court of Appeals in its opinion both relied upon the opinion of this Court in *National Labor Relations Board* v. *Electric Vacuum Cleaner Co.*, 315 U. S. 685. Other decisions of Circuit Courts of Appeal have also cited the *Electric Vacuum Cleaner* case in various situations.* However, it is submitted that the question presented by this petition is not settled by the *Electric Vacuum Cleaner* case, and that the Circuit Court of Appeals was in error in interpreting the *Electric Vacuum Cleaner* case as depriving it of power.

The entire substance of this Court's disposition of the delay aspect of the *Electric Vacuum Cleaner* case is found in this one paragraph from the Court's opinion:

> "We have noted the employer's objection to the burden of back pay placed upon it because of the Board's alleged delay in entering the final order. Handling of complaints as quickly as is consistent with good administration is of course essential. It is important both to the employer, who may have to pay back wages, and to the employee, who must live without his job. Unfortunately, this cause took from June 10, 1937, to December 31, 1939. There is nothing in the record, beyond a failure of the Board to file an intermediate report, which would tend to justify us, however, in shortening the period for compensation. This error was admitted and corrected by the Board. We cannot penalize the employees for this happening" (315 U. S. at pp. 697-8).

---

* In its opinion in the instant case the Circuit Court of Appeals pointed to its own earlier opinion in *Triplex Screw Co.* v. *National Labor Relations Board*, 117 F. (2d) 858, and stated that the following are "to the same effect": *National Labor Relations Board* v. *Isthmian S.S. Co.*, 126 F. (2d) 598 (C. C. A. 2); *National Labor Relations Board* v. *William Davies Co.*, 135 F. (2d) 179, 183 (C. C. A. 7); *Eagle-Picher Mining & Smelting Co.* v. *National Labor Relations Board*, 119 F. (2d) 903 (C. C. A. 8); *National Labor Relations Board* v. *Electric Vacuum Cleaner Co.*, 315 U. S. 685.

It is apparent that the employer was objecting to delays which occurred after, not before, the complaint was issued. The complaint in the *Electric Vacuum Cleaner* case was issued within a few months after the events complained of. This fact appears from this Court's opinion and from the Board's report referred to therein.

In short, the employer's objection in the *Electric Vacuum Cleaner* case was that the wheels of the administrative mill ground too slowly. The objection of your petitioner here is that it took more than three years for the wheels to begin to turn.

It will not do to dispose of the question as was done in the *Electric Vacuum Cleaner* case by stating: "We cannot penalize the employees for this happening" (315 U. S. at p. 698). The argument works both ways. Why should the employer be the one to be penalized for the defaults of the Board over which the employer had no control? Why should the employer bear the burden when the Board cannot make up its mind for more than three years to give the employer definite notice of the existence of a possible liability?

B.

Your petitioner has consistently taken the position before the Board and before the Court that the alleged evidence of unfair labor practices in this case is so feeble that the inferences drawn by the Board are entirely unwarranted. Only by an unwarranted stretching of a form of false reasoning is it possible to conclude that the strike was anything more than a test of economic strength, not stimulated nor accompanied by any unfair labor practices on the part of your petitioner.

The Court of Appeals was urged by your petitioner to consider the familiar admonition from *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U. S. 197:

> "Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion" (p. 229).

However, the Court did no more than refer in its opinion to the *Consolidated Edison* case. The Court did not attempt to demonstrate its application, and applied it in a way probably in conflict with this Court's decision.

As an indication, the significance of *H. J. Heinz Co.* v. *National Labor Relations Board*, 311 U. S. 514, to this case might be considered. The *Heinz* case, it will be recalled, was decided January 6, 1941, and held that it was an unfair labor practice for an employer not to sign an agreement with the Union once the terms had been agreed upon. In the present case it so happened that in 1937 your petitioner and the Union made an agreement; it was drawn up in writing but it was not signed. The agreement was in force for about six months, and when the date approached on which the contract would expire by its terms, the Union, on September 2, 1937, wrote your petitioner that on September 7, 1937, they would present "desired changes and amendments to the working agreement" (R. 152). On September 7, 1937, the Union presented its new demands which included a closed shop, a check-off, much higher wages and much better working conditions (R. 153, 213, 338, 365-6). The Union's position was that when the strike began on October 4, 1937, the unsigned agreement had been terminated by giving notice (R. 157).

The attention of the Circuit Court was directed to these matters, and also to the fact that the lack of a signature on

the 1937 agreement was never considered of any practical importance until after the *Heinz* case was decided in 1941, several years later. Contemporaneous letters and the Union's charges omit any reference to the lack of a signature, and refer to wages, hours, and the other demands (R. 135, 152, 153, 213, 338, 289, 174, 597, 601).

The Court of Appeals appears to have misapprehended the significance of these points and to have considered them without merit since the petitioner did not "claim surprise" (R. 609). The true significance is that these and other points demonstrate forcibly that the Board's findings are not supported by proper evidence.

Conclusion.

WHEREFORE, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Dated: March 2, 1944.

KENNETH GARDNER,
Counsel for Petitioner, American Creosoting Company, Incorporated.

BERNARD D. ATWOOD,
of Counsel.

APPENDIX.

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C., Supp. V, Sec. 151, *et seq.*) are as follows:

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

* * *

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization * * *.

* * *

(5) To refuse to bargain collectively with the representatives of his employees, * * *.

SEC. 10. * * *

(c) * * * If * * * the Board shall be of the opinion that any person * * * has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this act. * * *

* * *

(e) The Board shall have power to petition any circuit court of appeals of the United States * * * within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order * * *. The findings of the Board as to the facts, if supported by evidence, shall be conclusive. * * * The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review * * * by the Supreme Court of the United States and upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

Lawyers Press, Inc., 165 William St., N. Y. C.; 'Phone: BEekman 3-2300

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1943

AMERICAN CREOSOTING COMPANY, INCORPORATED,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	1
Statute involved	2
Statement	3
Argument	8
Conclusion	10
Appendix	12

CITATIONS

Cases:	
Berkshire Knitting Mills v. *National Labor Relations Board*, 121 F. (2d) 235	9, 10
Eagle-Picher Mining & Smelting Co. v. *National Labor Relations Board*, 119 F. (2d) 903	9
Firth Carpet Co. v. *National Labor Relations Board*, 129 F. (2d) 633	9
National Labor Relations Board v. *Bachelder*, 120 F. (2d) 574, certiorari denied, 314 U. S. 647	9
National Labor Relations Board v. *J. G. Boswell Co.*, 136 F. (2d) 585	9
National Labor Relations Board v. *William Davies Co.*, 135 F. (2d) 179, No. 319, present Term, certiorari denied, October 18, 1943	9, 10
National Labor Relations Board v. *Electric Vacuum Cleaner Co.*, 315 U. S. 685	9
National Labor Relations Board v. *Kentucky Fire Brick Co.*, 99 F. (2d) 89	9
National Labor Relations Board v. *Polson Logging Co.*, 136 F. (2d) 314	9, 10
National Labor Relations Board v. *Wilson Line, Inc.*, 122 F. (2d) 809	9, 10
Overnight Motor Co. v. *Missel*, 316 U. S. 572	10
Phelps Dodge Corp. v. *National Labor Relations Board*, 113 F. (2d) 202, affirmed, 313 U. S. 177	9
Triplex Screw Co. v. *National Labor Relations Board*, 117 F. (2d) 858	9
Statute:	
National Labor Relations Act, Act of July 5, 1935, c. 372, 49 Stat. 449 (29 U. S. C. 151 *et seq.*):	
Sec. 7	12
Sec. 8 (1)	12
Sec. 8 (3)	12
Sec. 8 (5)	12
Sec. 10 (c)	12

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OPINIONS BELOW

The opinion of the circuit court of appeals (R. 607)[1] is reported in 139 F. (2d) 193. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 84–111) are reported in 46 N. L. R. B. 240.

JURISDICTION

The decree of the court below (R. 606) was entered on December 4, 1943. The petition for a

[1] The designation "R" refers to the printed record filed in the court below, as supplemented by the opinion and decree of the court below.

writ of certiorari was filed on March 3, 1944. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and under Section 10 (c) of the National Labor Relations Act.

QUESTIONS PRESENTED

1. Whether there is substantial evidence to support the findings of the Board, which were sustained by the court below, that petitioner, by interrogating employees regarding union affiliation, by threatening loss of employment as the penalty for union membership, by discharging an employee because of his union membership, by refusing to bargain with the union[2] which represented a majority of its employees in an appropriate unit, thus causing and prolonging a strike of its employees, and by discriminatorily refusing reinstatement to 40 of the strikers, has committed unfair labor practices in violation of Section 8 (1), (3), and (5) of the Act.

2. Whether the Board's delay in issuing a complaint herein, after charges were filed against petitioner, should shorten the period within which back pay is to be computed for the employees ordered reinstated.

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[2] Oil Workers International Union, Local 379, affiliated with what was then the Committee for Industrial Organization and is now the Congress of Industrial Organizations.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act are set out in the Appendix, *infra*, pp. 12–13.

STATEMENT

Upon the usual proceedings, the Board on December 23, 1942, issued its findings of fact, conclusions of law, and order (R. 84–111). The pertinent facts, as found by the Board, and shown by the evidence, may be summarized as follows:[3]

The Union was formed at petitioner's plant on December 4, 1936 (R. 87; 131, 245). The next day, Plant Superintendent Brown (R. 87; 118), characterizing the Union as "not a fit union to belong to," sought to persuade employee Keuhne, one of its founders, to abandon the organization and to influence fellow employees to do likewise (R. 87; 314–315). Brown also inquired of employee Ealey whether he had joined the Union, denounced the Union to him, tried to influence him to "drop out" of it and to "talk to the men and try to pull them out," and reinforced these remarks with the threat that petitioner would shut down its plant before it would sign a contract with any union (R. 87; 298–299). Other supervisory employees engaged in similar coercive conduct, questioning subordinates as to their union

[3] In the following statement, the references preceding the semicolon are to the Board's findings; the succeeding references are to the supporting evidence.

affiliation and interests, and threatening that such affiliation would lead to loss of employment (R. 87–90; 201–202, 220–222, 232–233, 235, 243–244, 283, 289–291, 292, 294–295, 299–300, 375–376, 379–380, 467, 482).

Upon questioning employee Frank McKenzie and thus ascertaining that he "seemed to be the strongest for the Union," petitioner, on December 15, 1936, instructed McKenzie's immediate superior to "get rid of" him. Pursuant to these instructions, McKenzie was discharged on the same day. (R. 87–88; 220–222, 232–233, 235–238.)

The Board concluded that petitioner discriminated in regard to the hire and tenure of employment of Frank McKenzie, thereby discouraging membership in the Union in violation of Section 8 (3) of the Act, and by the foregoing inquiries and statements interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act (R. 90, 108).

By March 19, 1937, the Union, which concededly represented a majority of petitioner's employees in an appropriate unit (R. 91; 341), had arrived at an understanding with petitioner as to terms and conditions of employment. However, petitioner refused to incorporate this understanding in a signed, written document. (R. 92; 132–134, 147, 259, 454, 594–596.) Petitioner prevailed, and the parties operated under the oral agreement until September 1937 (R 92; 148, 151, 259, 595). While this agreement was in effect,

petitioner continued its efforts to undermine the Union by telling employees that it would never recognize it, by urging employees not to become or remain members of the Union, and by threatening them with loss of employment for union membership or activity (R. 93; 289–291, 201–203, 294–295, 292, 299–300).

In September 1937, the Union sought a revision of terms and a signed contract (R. 93; 152, 269–270, 135–136). Faced with petitioner's unyielding insistence on the terms of the previous oral agreement, the Union finally offered to accept these terms if reduced to a signed, written contract (R. 93–94; 135–136, 161–162, 183–184, 200, 258–259, 338–339, 346–345, 366, 456–458). Petitioner, however, refused to sign a written contract (R. 94; 136, 182–183, 260, 339–340). Finally, on October 4, 1937, petitioner's employees struck in an effort to compel petitioner to enter into a written contract with the Union (R. 94; 126, 137, 166, 258–268, 265, 271, 309, 340). During the strike, the parties held several meetings in an effort to settle the controversy. Petitioner still made no counterproposal apart from reiterating its willingness to perpetuate the oral agreement of March 1937. In answer to the Union's demand that this agreement be signed, petitioner answered, "If you think this company will put their name on paper, either for this union or any other union * * * you are badly mistaken". (R. 94–95; 139–140, 200, 215, 243–244, 339, 458–459.)

On December 13, 1937, petitioner reopened its plant for operation, replacing the striking employees with others (R. 100; 142, 180–181, 184, 217, 377). The strike proving unsuccessful, the employees abandoned it on December 23, and on that date about 85 of the strikers appeared at the plant and requested reinstatement (R. 100; 141–142, 191–192, 324–325). Reinstating only 13 of the applicants, petitioner has since refused to displace those hired during the strike, and throughout has failed to reemploy 40 of the strikers, though it has recruited new employees while the 40 strikers awaited reinstatement (R. 101–102; 141–142, 192, 174–175, 264–265, 328, 378, 494, 565–566, 301, 325, 286–287, 283–285, 577–581, 591, 603–604, 543–546). In refusing reinstatement to some of the strikers who subsequently renewed their applications for employment, petitioner indicated that its refusal was actuated by the desire to punish them for their activities on behalf of the Union (R. 102–103; 283–284, 285, 328, 336, 286–287).

The Board concluded that petitioner failed in its duty to bargain with the Union in good faith as the exclusive representative of its production employees, and to embody any understanding reached in a written agreement signed by both parties, and that petitioner, on and at all times after March 19, 1937, by so refusing to bargain collectively with the Union, interfered with, restrained, and coerced its employees in the exercise

of the rights guaranteed in Section 7 of the Act (R. 95–96). The Board further concluded that the strike of October 4, 1937, was caused by petitioner's refusal to bargain as aforesaid, and was thereafter prolonged by petitioner's continued refusal to bargain (R. 99); that petitioner's refusal to reinstate the strikers constituted a discharge for engaging in concerted activity on behalf of the Union; and that on and after December 23, 1937, by its refusal to reinstate the strikers, petitioner has discriminated against such employees in regard to hire and tenure of employment, thereby discouraging membership in the Union and interfering with, restraining, and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act (R. 103).

Upon findings that petitioner's conduct as above summarized constituted unfair labor practices within the meaning of Section 8 (1), (3), and (5) of the Act (R. 108), the Board ordered petitioner to cease and desist from the unfair labor practices found and from in any other manner interfering with, restraining, or coercing its employees in the exercise of their rights as guaranteed in Section 7 of the Act; upon request, to bargain collectively with the Union, and if agreement is reached as to terms of employment, to embody such agreement in a signed, written contract; to offer the 41 employees discriminated against, reinstatement with back pay; and to post appropriate notices (R. 108–111).

On April 22, 1943, the Board filed in the court below its petition for enforcement of its order against petitioner (R. 1–5). On December 4, 1943, the court handed down its opinion (R. 607–613), and on the same date entered its decree (R. 606) sustaining the findings of the Board as to the unfair labor practices, and enforcing the Board's order with a modification not relevant here (R. 110, 610–612).

ARGUMENT

1. Petitioner's contention (Pet. 10–12) that the Board's findings of unfair labor practices are not supported by substantial evidence presents no question of general importance. In any event, the evidence summarized in the Statement (*supra*, pp. 3–6) affords full support for the challenged findings, as the court below held (R. 608–610).

2. Equally unsound is petitioner's position (Pet. 4–10) that the Board's delay in issuing the complaint should toll the back-pay period. It is well settled that administrative delay does not operate to deny to the Board the right to proceed to the full effectuation of its orders, nor to deprive employees of the remedy to which they are entitled by reason of unfair labor practices committed against them by their employer. This rule is based on two main grounds: (1) that the Act has not conferred jurisdiction on the courts to determine whether the Board has acted with adequate promptness in disposing of the business be-

fore it, the same flexibility being allowed to an administrative agency as to courts of record, since "the same factors of crowded dockets and inadequate personnel may result in the unfortunate delays of which litigants often justly complain" (*National Labor Relations Board* v. *Wilson Line, Inc.*, 122 F. (2) 809, 815 (C. C. A. 3)); (2) that between an offending employer and the victims of his unfair labor practices, the consequences of administrative delay should be borne by the former (*National Labor Relations Board* v. *Electric Vacuum Cleaner Co.*, 315 U. S. 685, 697–698 [4]).

Petitioner attempts to distinguish (Pet. 5–6, 10) between delay before and after the issuance of a complaint, asserting (Pet. 5–6) that the delay in the issuance of the complaint resulted in

[4] To the same effect are *National Labor Relations Board* v. *J. G. Boswell Co.*, 136 F. (2d) 585, 597 (C. C. A. 9); *National Labor Relations Board* v. *Polson Logging Co.*, 136 F. (2d) 314 (C. C. A. 9) (*sub silentio*); *National Labor Relations Board* v. *Wm. Davies Co.*, 135 F. (2d) 179, 183–184 (C. C. A. 7), No. 319, present Term, certiorari denied, October 18, 1943; *Firth Carpet Co.* v. *National Labor Relations Board*, 129 F. (2d) 633, 636 (C. C. A. 2); *Berkshire Knitting Mills* v. *National Labor Relations Board*, 121 F. (2d) 235, 237 (C. C. A. 3); *National Labor Relations Board* v. *Bachelder*, 120 F. (2d) 574, 579 (C. C. A. 7), certiorari denied, 314 U. S. 647; *Eagle-Picher Mining & Smelting Co.* v. *National Labor Relations Board*, 119 F. (2d) 903, 915 (C. C. A. 8); *Triplex Screw Co.* v. *National Labor Relations Board*, 117 F. (2d) 858, 862 (C. C. A. 6); *Phelps Dodge Corp.* v. *National Labor Relations Board*, 113 F. (2d) 202, 206 (C. C. A. 2), affirmed, 313 U. S. 177, 200; *National Labor Relations Board* v. *Kentucky Fire Brick Co.*, 99 F. (2d) 89 (C. C. A. 6) (*sub silentio*).

its inability to "know during that time whether the Board considered the case of sufficient merit to justify a complaint and hearing, * * *." This, we submit, is not a distinction in the applicable principle. As this Court has declared in answer to a similar contention, "Perplexing as petitioner's problem may have been, the difficulty does not warrant shifting the burden to the employee." *Overnight Motor Co.* v. *Missel*, 316 U. S. 572, 583. Moreover, the courts have been as consistent in refusing to shorten the back-pay period due to delay in the issuance of a complaint, as they have been in cases involving other types of administrative delay. "The matter of time with regard to the issuance of a complaint by an administrative body must necessarily be one of the matters within the discretion of that body." *Berkshire Knitting Mills* v. *National Labor Relations Board*, 121 F. (2d) 235, 237 (C. C. A. 3); see also *National Labor Relations Board* v. *Polson Logging Co.*, 136 F. (2d) 314 (C. C. A. 9); *National Labor Relations Board* v. *Wm. Davies Co.*, 135 F. (2d) 179, 183–184 (C. C. A. 7), No. 319, present Term, certiorari denied, October 18, 1943; *National Labor Relations Board* v. *Wilson Line, Inc.*, 122 F. (2d) 809, 815 (C. C. A. 3).

CONCLUSION

The decision below, sustaining the Board's order as amended, is correct, and presents no

conflict of decisions or question of general importance. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.

ALVIN J. ROCKWELL,
General Counsel,
RUTH WEYAND,
ISADORE GREENBERG,
Attorneys,
National Labor Relations Board.

MARCH 1944.

APPENDIX

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C. 151 *et seq.*) are as follows:

> SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.
>
> SEC. 8. It shall be an unfair labor practice for an employer—
>
> (1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.
>
> * * * * *
>
> (3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization * * *.
>
> * * * * *
>
> (5) To refuse to bargain collectively with the representatives of his employees, * * *.
>
> SEC. 10. * * *
>
> (c) The testimony taken by such member, agent or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any

such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. * * *

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